UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

SONIA B. BACH, Plaintiff, vs. COMMUNITY TIES OF AMERICA, INC., JOHN DOES 1-5, JANE DOES 1-5, DOE CORPORATIONS 1-5, DOE PARTNERSHIPS 1-5, DOE NON-PROFIT ORGANIZATIONS 1-5, DOE GOVERNMENTAL AGENCIES 1-5, Defendants.	CIV. NO. 18-00103 LEK-WRP

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Before the Court is Defendant Community Ties of America, Inc.'s ("Defendant" and "CTA") Motion for Summary Judgment ("Motion"), filed on June 26, 2019. [Dkt. no. 37.] Plaintiff Sonia B. Bach ("Plaintiff") filed her memorandum in opposition to the Motion on July 19, 2019, and Defendant filed its reply on July 26, 2019. [Dkt. nos. 42, 43.] This matter came on for hearing on August 2, 2019. On August 12, 2019, this Court issued an entering order outlining the Court's decision on the Motion. [Dkt. no. 45.] The instant Order supersedes that entering order. Defendant's Motion is hereby denied as moot as to the portion of Count I asserting discrimination based on age

because that claim is dismissed, and the Motion is granted in all other respects.

BACKGROUND

I. Factual Background

The majority of the facts in this case are not in dispute. Defendant conducts certification and licensing activities in the State of Hawai`i for Community Care Foster Family Homes ("CCFFHs") and Case Management Agencies ("CMAs" and collectively "Providers").[1] Defendant hired Plaintiff for the full-time position of Compliance Manager ("CM") in 2010. [Def.'s Concise Statement of Facts in Supp. of Motion for Summary Judgment ("CSOF"), filed 6/26/19 (dkt. no. 36), at ¶¶ 1-4; Pltf.'s concise statement of facts in response to CSOF ("Responsive CSOF"), filed 7/19/19 (dkt. no. 41), at pg. 2.[2]] Plaintiff's role as a CM was to evaluate the Providers' compliance with Hawai`i regulations. [CSOF at ¶ 5.] Plaintiff received Defendant's Employee Manual in January 2012, which

[1] Defendant is a for-profit corporation with its principal place of business in Tennessee. [Notice of Removal at ¶ 4.]

[2] Plaintiff's CSOF consisted of a single paragraph specifically controverting Defendant's CSOF ¶ 46. Therefore, unless otherwise specified, the statements in Defendant's CSOF, other than ¶ 46, are deemed admitted. See Local Rule LR56.1(g) ("For purposes of a motion for summary judgment, material facts set forth in the moving party's concise statement will be deemed admitted unless controverted by a separate concise statement of the opposing party.").

prohibits, *inter alia*: unsatisfactory or careless work; the use of obscene or abusive language toward any supervisor, employee, or customer; and rudeness toward any customer. [Id. at ¶ 7.]

Full-time CMs such as Plaintiff were expected to work one day a week at Defendant's office or their home-offices, and four days in the field reviewing Providers, with two to three on-site reviews daily. CMs must complete their monthly quota of on-site reviews but could carry over up to four reviews in a month. [Id. at ¶¶ 9-10.] In 2011, Plaintiff received an improvement plan addressing a number of issues, including: 1) not meeting productivity/quality expectations; 2) negative performance ratings for timeliness/quality; and 3) negative communications towards coworkers. [Id. at ¶ 14.]

In October 2012, Plaintiff fell and injured herself, returning full-time from leave in December 2012. [Id. at ¶ 15.] Plaintiff received ongoing medical treatment for injuries related to her hand, shoulder, ankle, and hip. Plaintiff's impairments related to her ability to walk, lift, write, and drive precluded her from consistently performing work requiring more than thirty minutes of driving. [CSOF at ¶¶ 16-17.]

In mid-2013 and December 2013, Plaintiff complained to Defendant and the United States Department of Labor ("DOL") that Defendant had not correctly deposited funds into her 401(k) account. As a result of Plaintiff's complaints, the DOL

initiated an investigation and an April through June 2014 audit of Defendant's records. [Id. at ¶¶ 51-52.]

In July of 2013, Angel England became Defendant's Hawai`i Operations Manager. [Id. at ¶ 3.] At that time, she was aware of Plaintiff's performance history. Ms. England received additional complaints from Providers and coworkers that Plaintiff's communications were harsh and/or impolite. Fellow CMs also observed Plaintiff's reports were incorrect and missing relevant information. In 2013, Ms. England gave Plaintiff a negative performance evaluation rating for behavior and work quality. In 2014, Ms. England observed that Plaintiff's interpersonal communication was improving but she still received anonymous Provider complaints for Plaintiff's on-site communications. In December 2014, Ms. England gave Plaintiff a negative rating for interpersonal relationships on her performance evaluation. [Id. at ¶¶ 18-22.]

In April 2015, Plaintiff took leave for surgery, and on April 28, 2015, she emailed Ms. England, stating "'I have no idea when I can return to work.'" [CSOF at ¶¶ 23-24 (some citations omitted) (quoting CSOF, Decl. of Angel England ("England Decl."), Exh. 17 (email from Plaintiff)).] On May 1, 2015, Defendant notified Plaintiff she would be terminated if she did not return to work by May 11, 2015 when her accrued paid leave would be exhausted. [Id. at ¶¶ 25.] Plaintiff responded

that termination on that basis would be illegal and that Defendant should consult its attorneys. [Responsive CSOF, Decl. of Sonia B. Bach ("Bach Decl.") at ¶ 7.] On May 6 and 8, 2015, Defendant informed Plaintiff it would not terminate her. [CSOF at ¶ 26.] Over the next five months, Defendant repeatedly inquired with Plaintiff as to whether, and when she could return to work, with or without reasonable accommodation. The parties discussed potential accommodations during Plaintiff's leave, including limiting her driving to forty-five minutes, per her physician's note, but Plaintiff disclaimed any need for accommodation. [Id. at ¶¶ 27-28.] On September 8, 2015, Plaintiff emailed Defendant's President and co-owner Ronald Lee saying "'[t]here is really no adjustment to be made to get me working . . . .'" [Id. at ¶ 29 (alterations in original) (citing Decl. of Ronald Lee ("Lee Decl.") at ¶¶ 52-53; Exh. 48 (email from Plaintiff to Ronald Lee)).]

After Ms. England took over Plaintiff's workload in 2015, she discovered Plaintiff had been consistently formatting her reports incorrectly, including not basing the reports on the applicable regulations, and incorrectly marking a Provider deficient. At an unspecified date, three Providers requested a different CM, complaining of Plaintiff's demanding, rude, and demeaning communications. [CSOF at ¶¶ 30-31.] Other CMs visiting Plaintiff's CCFFHs also reported Provider complaints

about Plaintiff's behavior, while four coworkers complained about her as well. Plaintiff was the only CM that Ms. England had Providers request to not conduct their evaluation. Ms. England believed that Plaintiff's performance was unsatisfactory and noncompliant with company policy due to these complaints. [Id. at ¶¶ 32-33.]

Ms. England, in consultation with Mr. Lee and Matthew Ockerman,[3] prepared a performance evaluation and probationary corrective action plan for Plaintiff. Ms. England issued them to Plaintiff upon Plaintiff's return to work on September 21, 2015. Plaintiff was informed she could be terminated if her performance did not improve. [Id. at ¶¶ 34-36.] Plaintiff's performance issues continued when she returned, which included: her failure to record Provider visit dates as instructed; improper citation of non-deficiencies in her reviews; incorrectly marking three Providers noncompliant without explanation; accepting incomplete corrective action plans; and failing to timely complete her reviews. [England Decl. at ¶¶ 53-54, 73, 150-51, 160-61, 164-75.] Thirteen of Plaintiff's thirty-three Providers commented negatively on Plaintiff's performance or behavior. [CSOF at ¶ 37.]

[3] Matthew Ockerman is Defendant's co-owner and Administrative Director. [CSOF, Decl. of Matthew Ockerman ("Ockerman Decl.") at ¶ 1.]

After Plaintiff's probationary period ended, Ms. England determined that Defendant should terminate Plaintiff due to her continued errors, poor production, and failure to meet quality standards. [Id. at ¶¶ 37-38.] However, before Ms. England acted on her decision, she received complaints from two additional Providers regarding Plaintiff. [Id. at ¶ 39.] Ms. England investigated the complaints and determined that Plaintiff mishandled a Provider-related complaint, and engaged in misconduct that resulted in a CCFFH client's healthcare agents revoking their healthcare agent status, leaving the client without a "surrogate healthcare agent." [England Decl. at ¶ 188.] In January of 2016, three more Providers complained about Plaintiff's conduct, two of whom asked that Defendant not assign Plaintiff to review their homes again. [Id. at ¶¶ 193-98.]

Ms. England began drafting Plaintiff's termination letter in the last week of January 2016. On February 3, 2016, Ms. England scheduled a termination meeting with Plaintiff for February 11, 2016. On February 5, 2016, Plaintiff emailed Ms. England a physician's note limiting her walking or driving to forty consecutive minutes. At that time, Plaintiff lived in Kaneohe, and Defendant's place of business was also in Kaneohe. Only two percent of Providers were within a reasonable guaranteed driving time of forty minutes or less. Assigning

Plaintiff to only that two percent of Providers would have been equivalent to less than a week of full-time work per month. [England Decl. at ¶¶ 57-67.] On February 5, 2016, Ms. England called Plaintiff. During that phone call, Plaintiff told Ms. England that she could not complete two assignments in Wahiawa but could complete her other assignments. Ms. England reassigned the Wahiawa Providers. Ms. England informed Plaintiff that Defendant would not be able to guarantee a forty-minute time limit on driving. Plaintiff responded that it was not an issue because she could leave the highway if necessary. [CSOF at ¶¶ 41-45.]

At the meeting on February 11, 2016, Ms. England terminated Plaintiff for her unprofessional behavior, continuous citing of Providers for issues not reviewed by Defendant, and inadequate productivity. [Id. at ¶ 46.] Defendant's paragraph 46 is the only paragraph in the CSOF contested by Plaintiff. Even so, Plaintiff does not specifically dispute the facts in paragraph 46. Plaintiff notes that she was terminated at the February 11, 2016 meeting after she had requested accommodations in early February and submitted a doctor's note on February 5, 2016 that limited driving as part of that accommodation. [Responsive CSOF at ¶ 46.] Therefore, the parties are in substantial agreement regarding the facts surrounding Plaintiff's termination. Defendant has not offered any facts to

contest Plaintiff's asserted timeline that her termination occurred after her accommodation request was received by Defendant. [CSOF at ¶¶ 44-46.]

At the time of Plaintiff's termination, Defendant's Hawai`i Office employed eight staff, including Ms. England. One of those employees, a thirty-eight-year-old administrative assistant was terminated for excessive absences on the same day as Plaintiff. [Id. at ¶ 47.] Defendant's other CMs were ages: thirty-seven, sixty-two, sixty-four, sixty-five, and seventy. Shortly after Plaintiff's termination, Defendant promoted a then-part-time sixty-five-year-old CM to full-time CM to take over Plaintiff's position. [Id. at ¶¶ 48-49.] Ms. England has previously granted three employees' accommodation requests and has never received a request that precluded performance of job duties except for Plaintiff's. Neither Ms. England, Mr. Lee, nor Mr. Ockerman stated that Plaintiff was terminated, or expressed animus against Plaintiff, because of her age, disability, request for an accommodation, or complaint about a violation of law. [Id. at ¶ 53.]

II. Procedural Background

On June 21, 2017, Plaintiff filed her Complaint in the Circuit Court of the First Circuit, State of Hawai`i. [Notice of Removal of State Court Action to Federal Court ("Notice of Removal"), filed 3/16/18 (dkt. no. 1), Decl. of Joseph A. Ernst,

Exh. A (Complaint).] Plaintiff alleges she filed a Charge of Discrimination with the Hawai`i Civil Rights Commission ("HCRC"), alleging discrimination due to age, disability, and retaliation. Plaintiff alleges that, on March 23, 2017, the HCRC issued a Notice of Dismissal and Right to Sue letter. [Complaint at ¶¶ 6-8.]

On March 16, 2018, Defendant removed the action to this district court based on diversity jurisdiction. [Notice of Removal at ¶¶ 3-4.] Count I of the Complaint alleges a violation of Haw. Rev. Stat. § 378-2(a)(1) and (3) because Plaintiff was wrongfully terminated due to discrimination based on her age and disability. [Complaint at ¶¶ 11-12.] Count II alleges retaliation against Plaintiff for opposing the alleged discrimination based on age and disability in violation of § 378-2(a)(2). [Id. at ¶ 17.] Count III alleges a violation of the Hawai`i Whistleblowers' Protection Act ("HWPA"), Haw. Rev. Stat. § 378-62, for discrimination due to Plaintiff's reporting of a violation of law. [Id. at ¶ 19.] Plaintiff has since clarified that she is not asserting an aiding and abetting claim under § 378-2(a)(3). [Mem. in Opp. at 3.]

Plaintiff prays for the following relief: reinstatement of her position with Defendant; general and special damages, including back pay, front pay, and other expenses; punitive damages; attorney's fees, costs, and

interest, including prejudgment interest; and any other appropriate relief. [Complaint at pgs. 6-7.]

DISCUSSION

I. Withdrawn Claim

Plaintiff admits there is insufficient evidence to support a claim for age discrimination. [Mem. in Opp. at 3,] Therefore, Plaintiff's claim in Count I alleging she was discriminated against on the basis of age is dismissed. See Fed. R. Civ. P. 41(a)(2) ("Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper."). In light of the dismissal of Plaintiff's age discrimination claim, the Motion is denied as moot as to the portion of Count I alleging age discrimination.

II. Haw. Rev. Stat. § 378-2 Disability Discrimination Claim

A. Plaintiff's Allegations of Discrimination

Count I of the Complaint alleges Defendant discriminated against Plaintiff on the basis of disability, in violation of Haw. Rev. Stat. § 378–2(a)(1)(A). [Complaint at ¶ 11.] She states that, after falling and injuring herself in October 2012, she had ongoing medical impairments in her hand, shoulder, ankle, and hip. [Bach Decl. at ¶ 3.] Plaintiff claims she was disabled and unable to work between April 17, 2015 and September 2015. [Id. at ¶ 5.] The allegations of

discrimination arise from Plaintiff's "early February 2016" request for a reasonable accommodation for her disability, the accommodation being assignment to "work assignments closer to her home and the company offices so she did not need to walk as much as before." [Complaint at ¶ 9.C.] Plaintiff alleges Defendant failed to accommodate her request and that "[t]he actions of Defendant's agents and employees were in violation of Hawaii Revised Statutes § 378-2[(a)](1) . . . in that Plaintiff was wrongfully terminated, and suffered discrimination in terms, conditions, and privileges of [her] employment due to her age and a disability." [Id. at ¶ 11.]

B. Standard for § 378-2(a)(1) Claims at Summary Judgment

Section 378–2(a)(1)(A) makes it an unlawful discriminatory practice "[f]or any employer to refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment" because of a person's disability. "[B]ecause the definitions of disability in the ADA and HRS § 378–2 are substantially identical, the Hawaii Supreme Court has expressly adopted 'the [ADA] analysis for establishing a prima facie case of disability discrimination under HRS § 378–2,'" "and looks 'to the interpretations of analogous federal laws by the federal courts for guidance.' " Thorn v. BAE Sys. Haw. Shipyards, Inc., 586 F. Supp. 2d 1213,

1219 n.5 (D. Hawai`i 2008)(citing French v. Hawaii Pizza Hut, Inc., 105 Hawai`i 462, 467, 99 P.3d 1046, 1050 (2004)). Accordingly, the ADA claim framework is used to analyze § 378-2 claims.

On a motion for summary judgment on disability discrimination claims:

> The court applies the familiar burden-shifting analysis derived from McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), to claims of discrimination on account of a disability. See, e.g., Raytheon Co. v. Hernandez, 540 U.S. 44, 49–50, 124 S. Ct. 513, 157 L. Ed. 2d 357 (2003) (applying McDonnell Douglas burden shifting framework to [Americans with Disabilities Act ("ADA")] disability discrimination claim); Thorn v. BAE Sys. Haw. Shipyards, Inc., 586 F. Supp. 2d 1213, 1218–19 (D. Haw. 2008).
>
> Under this burden-shifting analysis, Plaintiff must first establish a prima facie disability discrimination claim. See, e.g., Raytheon, 540 U.S. at 49 n.3, 124 S. Ct. 513. Plaintiff must put forth evidence that she: (1) is "disabled" within the meaning of the statute; (2) is a "qualified individual" (that is, she is able to perform the essential functions of her job, with or without reasonable accommodations); and (3) suffered an adverse employment action because of her disability — *i.e.*, Defendant failed to reasonably accommodate her disability. See, e.g., Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233, 1237 (9th Cir. 2012) (citing 42 U.S.C. § 12112(a), (b)(5)(A) (requiring reasonable accommodation)).
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> "At the summary judgment stage, the 'requisite degree of proof necessary to establish a prima facie case . . . is minimal and does not even need to rise to the level of a preponderance of the evidence.'" Lyons v. England, 307 F.3d

> 1092, 1112 (9th Cir. 2002) (quoting Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994)).
>
> If Plaintiff establishes her prima facie case, the burden then shifts to Defendant to articulate a legitimate, nondiscriminatory reason for its employment action. Raytheon, 540 U.S. at 49 n.3, 124 S. Ct. 513. If Defendant proffers such a reason, "the presumption of intentional discrimination disappears, but the plaintiff can still prove disparate treatment by, for instance, offering evidence demonstrating that the employer's explanation is pretextual." Id. . . .

Vanhorn v. Hana Grp., Inc., 979 F. Supp. 2d 1083, 1090–91 (D. Hawai`i 2013) (some alterations in Vanhorn) (footnote omitted).

As detailed below, there is an absence of a genuine dispute of material fact. See Fed. R. Civ. P. 56(a) (a party is entitled to summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law"). Plaintiff has not established her prima facie case. Even if she had established, there is no genuine dispute that Defendant had a legitimate, nondiscriminatory, and unrebutted basis for terminating Plaintiff, and summary judgment is merited.

C. Plaintiff's Prima Facie Case

1. Disability

The ADA defines disability as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such

an impairment; or (C) being regarded as having such an impairment[.]" 42 U.S.C. § 12102(1). There is evidence in the record suggesting that Plaintiff has a disability. [CSOF, England Decl., Exh. 38 (Medical note from Bernard Porter, M.D.).] Defendant does not contend that Plaintiff is not disabled. See Mem. in Supp. of Motion at 15 (addressing the second element in the analysis without addressing the disability element). Plaintiff has therefore satisfied the first element.

2. Qualified Individual

> "The ADA defines a 'qualified individual' as an individual 'with a disability who, **with or without reasonable accommodation**, can perform the essential functions of the employment position that such individual holds or desires.'" Dark v. Curry Cnty., 451 F.3d 1078, 1086 (9th Cir. 2006) (quoting 42 U.S.C. § 12111(8)) (emphasis in original). "Essential functions" of a job are the "fundamental job duties of the employment position . . . not includ[ing] the marginal functions of the position." 29 C.F.R. § 1630.2(n)(1). Although Plaintiff bears the burden of establishing her prima facie case, Defendant "has the burden of production in establishing what job functions are essential[.]" Samper, 675 F.3d at 1237.

Vanhorn, 979 F. Supp. 2d at 1094 (alterations and emphasis in Vanhorn). In determining essential job functions, the ADA provides

> that "consideration shall be given to the employer's judgment as to what functions of the job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the

> essential functions of the job." 42 U.S.C. § 12111(8). "Such evidence, however, is not conclusive[.]" Rohr v. Salt River Project Agri. Improvement & Power Dist., 555 F.3d 850, 864 (9th Cir. 2009); see also 29 C.F.R. § 1630.2(n)(3) (itemizing additional factors to consider including the amount of time spent performing the function, consequences of not requiring the employee to perform the function, and work experience of current and past employees in that or similar jobs).

Id. (alteration in Vanhorn). Additionally, on the burden of proof, "the plaintiff also bears the burden of establishing that he can perform these essential functions 'with[] or without reasonable accommodation.'" Yonemoto v. McDonald, 114 F. Supp. 3d 1067, 1113 (D. Hawai`i 2015) (some citations omitted) (quoting Bates v. United Parcel Serv., Inc., 522 F.3d 974, 994 (9th Cir. 2007) (en banc)), *aff'd sub nom.*, Yonemoto v. Shulkin, 725 F. App'x 482 (9th Cir. 2018).

With regard to Plaintiff's essential job functions, Defendant presents evidence that Plaintiff's primary job responsibility was to evaluate Providers for compliance with state regulations by conducting on-site reviews four out of five days every week. See CSOF at ¶ 5 (some citations omitted) (citing Lee Decl. at ¶ 10; England Decl. at ¶¶ 5-13, 18-23, 33-37, 45, 109-13; England Decl., Exh. 7 (Job Description for CM position in Hawai`i)); CSOF at ¶¶ 8-9 (citations omitted).

The physical requirements listed in the Compliance Manager Job Description include: prolonged or considerable

walking, standing or sitting; ability to lift, carry, push or pull supplies or equipment; considerable reaching, stooping, bending, kneeling or crouching; ability to drive a car and/or fly in a plane; visual acuity and hearing to perform required duties; ability to read and write in English; and finger dexterity to operate equipment. [England Decl., Exh. 7 at 1-2.] Defendant argues that, because Plaintiff was unable to drive for more than forty minutes at a time, she was unable to perform the essential duty of conducting provider reviews. [Mem. in Supp. of Motion at 18.] "A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact." Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007) (citation omitted). Here, Defendant has met its summary judgment burden of identifying the portions of the record supporting its Motion.

In response, Plaintiff argues that she would have been able to perform the essential function of her position if Defendant had accommodated her by assigning her visits closer to her home and office. She also emphasizes that she informed Defendant that, if such assignments were not possible, "it would not be an issue, because she could just get off the highway if she needed to." [England Decl. at ¶ 212.] Both parties admit

that Plaintiff told Defendant she did not need her assigned Providers to be within a forty-minute drive because she could pull off the highway while driving. [CSOF at ¶ 45.] Plaintiff alleges this accommodation request for the first time in her opposition memorandum. In her Complaint, the only accommodation request raised is the accommodation "for her disability in the form of being assigned work assignments closer to her home and the company offices so she did not need to walk as much as before." [Complaint at ¶ 9.C.]

Fed R. Civ. P. 8 requires the plaintiff's allegations in the complaint to give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. Pickern v. Pier 1 Imports, Inc., 457 F.3d 963, 968 (9th Cir. 2006) (internal citation and quotation marks omitted). Generally, a party cannot oppose a motion for summary judgment by raising theories that lie outside the scope of her pleadings. See Wasco Prods., Inc. v. Southwall Techs., Inc., 435 F.3d 989, 991–92 (9th Cir. 2006) ("summary judgment is not a procedural second chance to flesh out inadequate pleadings") (citation and quotation marks omitted).

Here, the Complaint only gave Defendant notice of a claim for relief on the ground that Plaintiff was denied the accommodation of being assigned work closer to her home and office. [Complaint at ¶ 9.C.] In her memorandum in opposition,

Plaintiff raises a new ground for relief, that she was denied the accommodation of taking driving breaks after forty minutes of driving. [Mem. in Opp. at 13-14.] Both allegations are theories of denial of accommodation. However, the grounds upon which the "take-a-break" accommodation are based are outside the scope of pleadings that only contain a claim for a "forty-minute total limit" accommodation. Changing from one accommodation request to another changes everything from the reasonableness assessment, the geographic area available to Defendant to assign Plaintiff to, and the number of Providers she could see in a month. Defendant did not have notice of that claim. It is an improper attempt to add a theory outside the scope of the pleadings at the summary judgment stage, and thus the Court need not consider it. Therefore, the Court will review the Motion only based on Plaintiff's accommodation request of a forty-minute total limit, not based on the take-a-break accommodation.

The issue is: whether Plaintiff would be able to perform the essential functions of the job if her assignments were limited to Providers within a forty-minute total drive. The record must be viewed in the light most favorable to Plaintiffs, the nonmoving party, and all inferences must be drawn in Plaintiffs' favor. See S.R. Nehad v. Browder, 929 F.3d 1125, 1132 (9th Cir. 2019). The uncontroverted facts demonstrate that Plaintiff cannot perform the essential elements

of her job if assignments were limited to Providers within a forty-five-minute drive. Only two percent of Providers were within a forty-minute drive of Plaintiff. As a result, assigning her to only those Providers would accomplish less than one week's worth of full-time work per month. [CSOF at ¶ 44 (citing England Decl. at ¶¶ 57-69, 209, Exh. 13 (List of Provider Locations (Addresses Redacted)), Exh. 14 (List of Provider Locations (Addresses Redacted)); CSOF, Decl. of Jennifer L. Gitter ("Gitter Decl."), Exh. 1 (excerpts of trans. of 4/4/19 depo. of Pltf. ("Bach Depo. 1")) at 16:3-10, 96:18-97:18).] Furthermore, Plaintiff does not allege she would be able to perform her essential duties if limited to a forty minute driving range. See Responsive CSOF. Thus, Plaintiff would be unable unqualified for the position.[4] Plaintiff therefore has failed to establish the element of her prima facie case that she is qualified for the position.

Even accepting Plaintiff's verbal disclaimer of her previous accommodation as a new accommodation request, no evidence has been offered that Plaintiff would be a qualified

[4] Defendant does not raise the issue that Plaintiff is unqualified in reference to her termination from the position in question for her past performance and behavior. Cf. Yonemoto, 114 F. Supp. 3d at 118-19 (noting that the plaintiff had requested accommodation for his diabetes but was unable to perform his essential functions because of his personality problems, constant questions, aggressive conduct, and inability to take constructive criticism, and thus was not qualified).

individual if provided with the take-a-break accommodation. Because Plaintiff's declaration was entirely conclusory as to this issue, it is insufficient at summary judgment. See Head v. Glacier Nw. Inc., 413 F.3d 1053, 1059 (9th Cir. 2005) (noting the "longstanding precedent that conclusory declarations are insufficient to raise a question of material fact"), *abrogated on other grounds by* Univ. of Texas Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013). Plaintiff cannot carry her burden of proof on this element and her prima facie case fails on the issue of reasonable accommodation.

Plaintiff thus fails to establish a prima facie case. Further, although the Court could end its analysis here, it does not. Rather, for completeness, it examines whether, even assuming Plaintiff did establish her prima facie case, a genuine dispute of material fact exists that Defendant's legitimate, nondiscriminatory reason for Plaintiff's termination was not pretextual.[5]

[5] While not raised by Defendant, the Court notes, in the interest of completeness, Plaintiff was required to establish the element of causation. In order to establish a prima facie case, a plaintiff is required to prove that the adverse employment action would not have occurred but for her disability. Murray v. Mayo Clinic, 934 F.3d 1101, 1105 (9th Cir. 2019) Plaintiff's chances of success on this element are limited, as she already admitted the facts in the CSOF, including those that described her poor performance and communication unrelated to her disability and request for accommodation, and her failure to meet the standards of her improvement plan and probation status.

D. Defendant's Legitimate, Nondiscriminatory Reason

If Plaintiff was able to establish her prima facie disability discrimination claim, the burden would then shift to Defendant to articulate a legitimate, nondiscriminatory reason for its employment action. See Vanhorn, 979 F. Supp. 2d at 1091 (citing Raytheon, 540 U.S. at 49 n.3).

> To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's [adverse employment action]. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.

Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255-56 (1981) (footnotes omitted).

Defendant has presented admissible evidence that Plaintiff was terminated due to performance and conduct unrelated to her disability. See CSOF at ¶¶ 6-41. As stated in the uncontested portion of the CSOF, Defendant's documentation of Plaintiff's unsatisfactory performance and behavior began in 2011. [CSOF at ¶ 14 (citing Ockerman Decl. at ¶¶ 13-19, Exh. 50

(Employee Self Performance Evaluation dated July 29, 2011); Exh. 51 (Corrective Action Plan for Sunny Bach dated July 29, 2011); Exh. 52 (Plaintiff's response to the Corrective Action Plan dated August 4, 2011); Exh. 53 (Employee Performance Evaluation dated December 8, 2011)).] Defendant recorded Plaintiff's failure to meet expectations with regard to timeliness, quality of work, usage of the proper regulations, formatting of Corrective Action Reports, and interpersonal interactions with Providers and coworkers, resulting in complaints starting with her performance evaluation in 2011 until her termination on February 11, 2016. [CSOF at ¶ 19 (citing England Decl. at ¶¶ 84-88); CSOF at ¶ 20 (citing England Decl. at ¶¶ 89-90, Exh. 15 (2012 Employee Performance Evaluation)); CSOF at ¶ 22 (citing England Decl. at ¶¶ 92-93, Exh. 16 (2014 Employee Performance Evaluation)); CSOF at ¶ 30 (citing England Decl. at ¶ 134); CSOF at ¶ 31 (citing England Decl. at ¶¶ 135-137); CSOF at ¶ 36 (citing England Decl. at ¶¶ 53-54 73, 150-51, 160-61, 164-75' Exh. 26 (Anti-Bullying Policy signed by Plaintiff November 4, 2015); Exh. 28 (email containing Interpretive Guidelines dated September 21, 2015); Exh. 30 (undated Summary of non compliance by Sunny Bach between 9/21/15 and 1/31/2015 [sic]).] Defendant argues Plaintiff was terminated in in response to the listed deficiencies and behaviors. Noncompliance with performance and interpersonal

communication standards is sufficient justification for the adverse employment action. See Wexler v. Jensen Pharm., Inc., 739 F. App'x 911, 913 (9th Cir. 2018) (affirming summary judgment for the defendant in an age discrimination employment case where the plaintiff had performance issues that the defendant articulated as a legitimate, nondiscriminatory reason for termination). Furthermore, Plaintiff was put on notice that her failure to meet performance and communication standards, pursuant to an improvement plan and probation designation, would result in her termination. [CSOF at ¶¶ 34, 36.] Defendant has thus produced evidence that Plaintiff was terminated for legitimate, nondiscriminatory reasons.

E. Plaintiff's Burden to Prove Pretext

Where Defendant has satisfied its burden of production in that Plaintiff's termination was based on her poor work performance and inappropriate behavior, and not for discriminatory reasons, the burden shifts back to Plaintiff.

> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. See McDonnell Douglas, 411 U.S., at 804–805.

Burdine, 450 U.S. at 256.

Plaintiff fails to address that Defendant's proffered reasons was not the true reason for her termination. Her only argument is that there was a temporal proximity between her inquiry and termination. This is woefully inadequate to raise a pretext argument: "a party opposing a summary judgment motion must produce **specific** facts showing that there remains a genuine factual issue for trial and evidence significantly probative as to any material fact claimed to be disputed." Collings v. Longview Fibre Co., 63 F.3d 828, 834 (9th Cir. 1995) (brackets, quotation marks and citation omitted) (emphasis in Collings). Plaintiff offers no specific facts to raise genuine issues of material fact.

As no admissible evidence exists which raises a triable issue of fact that Plaintiff's termination was pretextual, Plaintiff fails to carry her burden on the final phase of the summary judgment analysis. Cf. Dark, 451 F.3d at 1085 (reversing a grant of summary judgment where the employer's stated reason for termination was vehicle safety related, and the terminated employee submitted evidence in the form of accounts of six vehicular accidents that did not result in termination). On this basis, the Motion is granted as to the

portion of Count I alleging discrimination on the basis of disability.

III. Haw. Rev. Stat. § 378-2(a)(2) Retaliation Claim

In Count II of the Complaint, Plaintiff alleges retaliation under § 378-2(a)(2) based on her opposition to disability discrimination and her request for a reasonable accommodation. The McDonald-Douglas burden shifting analysis also applies to §378-2(a)(2) retaliation claims. Thereby,

> a retaliation claim under HRS § 378–2(2) is subject to the following three-part test: (1) the plaintiff must first establish a prima facie case of such retaliation by demonstrating that (a) the plaintiff (i) "has opposed any practice forbidden by [HRS chapter 378, Employment Practices, Part I, Discriminatory Practices] or (ii) has filed a complaint, testified, or assisted in any proceeding respecting the discriminatory practices prohibited under this part," HRS § 378-2(2), (b) his or her "employer, labor organization, or employment agency [has] . . . discharge[d], expel[led], or otherwise discriminate[d] against the plaintiff," id., and (c) "a causal link [has] exist[ed] between the protected activity and the adverse action," Ray [v. Henderson], 217 F. 3d [1234,] 1240 [(9th Cir. 2000)] (citation omitted); (2) if the plaintiff establishes a prima facie case of retaliation, the burden shifts to the defendant to provide a legitimate, nondiscriminatory reason for the adverse employment action, see id.; Shoppe [v. Gucci Am., Inc.], 94 Hawai`i [368,] 378–79, 14 P.3d [1049,] 1059–60 [(2000)]; and (3) if the defendant articulates such a reason, the burden shifts back to the plaintiff to show evidence demonstrating that the reason given by the defendant is pretextual. . . .

Schefke v. Reliable Collection Agency, Ltd., 96 Hawai`i 408, 426, 32 P.3d 52, 70 (2001) (some alterations in Schefke) (some citations omitted), *as amended* (Oct. 11, 2001).

Even if assumed, for purposes of the instant Motion, the first two elements of the prima facie case of retaliation are satisfied, Plaintiff fails to demonstrate her protected activity was causally related to her termination. Temporal proximity alone generally has not been sufficient to establish causation unless the temporal proximity is very close. Clark Cty. Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001) (citations omitted). Simply pointing to the temporal proximity between Plaintiff's request for an accommodation and her termination is insufficient to infer causation. To the extent that any of her other protected activities can be said to be close in time to her termination, that temporal proximity is also insufficient to demonstrate causation.

Moreover, Defendant has articulated a legitimate, nondiscriminatory reason for its decision. Plaintiff must then, but cannot, demonstrate that this reason was merely a pretext for a discriminatory motive. Defendant presents admissible evidence of Plaintiff's long history of documented noncompliance with performance and conduct standards to support its legitimate nondiscriminatory reason for termination. Plaintiff only argues that her termination came soon after her request for

accommodation. [Responsive CSOF at ¶ 46.] Temporal proximity is insufficient to demonstrate pretext on a motion for summary judgment, and thus a triable question of fact on the issue of pretext has not been raised. The Motion is therefore granted as to Count II.

IV. Haw. Rev. Stat. § 378-62 Whistleblower Claim

A. Standard for § 378-62 Claims at Summary Judgment

Section 378–62 of the HWPA provides in relevant part:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:
>
> > (1) The employee, or a person acting on behalf of the employee, reports or is about to report to the employer, or reports or is about to report to a public body, verbally or in writing, a violation or a suspected violation of:
> >
> > > (A) A law, rule, ordinance, or regulation, adopted pursuant to law of this State, a political subdivision of this State, or the United States[.]

A § 378–62 claim has three requirements. First, an employee must have "engaged in protected conduct" as defined by HRS § 378-62(1). Griffin v. JTSI, Inc., 654 F. Supp. 2d 1122, 1131 (D. Hawai`i 2008) (citing Crosby v. State Dept. of Budget & Fin., 76 Hawai`i 332, 342, 876 P.2d 1300, 1310 (1994)). Second, the employer must take some "adverse action" against the employee. Id. And third, there must be "a causal connection

between the alleged retaliation and the 'whistleblowing.'" Id. To meet the causal connection requirement, an "employer's challenged action must have been taken 'because' the employee engaged in protected conduct." Id. In Crosby, the Supreme Court of Hawai`i adopted the McDonnell-Douglas burden shifting framework for HWPA claims. Therefore, a plaintiff can prove retaliation either through direct evidence, or by demonstrating that her protected activity played a role in the adverse employment action. Chan v. Wells Fargo Advisors, LLC, 124 F. Supp. 3d 1045, 1055 (D. Hawai`i 2015). The defendant employer can then defend by showing that the adverse employment action would have occurred regardless of the protected activity. Id.

B. Application of Standards

For the purposes of the instant Motion, the first two elements of an HWPA claim ("protected activity" and "adverse action") are not at issue. The only contested issue is causation. See Mem. in Supp. at 31. The causal connection requirement has two stages. "First, the employee must make a prima facie showing 'that his or her protected conduct was a "substantial or motivating factor" in the decision to terminate the employee.'" Griffin, 654 F. Supp. 2d at 1131 (quoting Crosby, 76 Hawai`i at 342, 876 P.2d at 1310). "Second, once the employee makes its prima facie showing, the employer must then 'defend affirmatively by showing that the termination would have

occurred regardless of the protected activity.'" Id. at 1132 (quoting Crosby, 76 Hawai`i at 342, 876 P.2d at 1310 (internal quotation marks and citation omitted)).

In her Complaint, Plaintiff alleges her termination was in violation of § 378-62 "due to Plaintiff's report of a violation of law." [Complaint at ¶ 19.] Plaintiff states that, on May 1, 2015, she reported to Defendant that terminating her for her inability to return to work was illegal and that Defendant should check with its lawyers. Bach Decl. at ¶¶ 6-9; see also CSOF at ¶ 26. In addition, she states that she became aware that Defendant did not carry disability coverage. [Bach Decl. at ¶¶ 6-9.] Plaintiff's report to Defendant is protected activity under the HWPA. Plaintiff alleges the adverse employment action was due to her protected activity. [Complaint at ¶ 19.]

Neither the Complaint nor the memorandum in opposition explains the factual basis as to how Plaintiff's termination was caused by her protected activity. Plaintiff implies her protected activity was a substantial motivating factor in her termination, (Mem. in Opp. at 17) but does not present any direct evidence for this supposition. Plaintiff's only argument appears to be an implied temporal proximity allegation. See Responsive CSOF at ¶ 46.

In a HWPA analysis, a plaintiff is permitted to use temporal proximity as circumstantial evidence that the plaintiff's protected conduct was a substantial or motivating factor in the adverse employment action. Griffin, 654 F. Supp. 2d at 1132. Here, Plaintiff states her termination came after her accommodation request and engaged in HWPA protected activity. [See Bach Decl. (Plaintiff's protected activity occurred on May 1, 2015, her termination occurred on February 11, 2016).] However, Plaintiff engaged in the protected activity more than nine months before her termination. This is a significant lapse of time. Cf. Chan, 124 F. Supp. 3d at 1056 (denying summary judgment in part on temporal proximity when the time between the protected activity and the first adverse action was approximately fifteen days, and the ultimate adverse action was within approximately fifty days). The Ninth Circuit previously concluded an eight-month gap between a plaintiff's protected activity and the retaliation does not permit an inference of causation. Woods v. Washington, 475 F. App'x 111, 113 (9th Cir. 2012) (citing Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1065 (9th Cir.2002)). Temporal proximity cannot be found where there is a the nine-month gap replete with intervening events, including Provider complaints, coworker complaints, and a negative performance review. The nine-month delay between her protected activity and the adverse

employment action is insufficient to support a permissible inference that Plaintiff's protected activity played a role in her termination. See Crosby, 76 Hawai`i at 342, 876 P.2d at 1310 (the test is whether the protected activity played a role in the employment action). Plaintiff has not made a prima facie case for retaliation.

Even if Plaintiff had carried her burden as to the substantial or motivating factor inquiry, summary judgment is still merited. Employers are "entitled to summary judgment if they can demonstrate that they 'would have reached the same adverse employment decision even in the absence of the employee's protected conduct.'" Anthoine v. N. Cent. Ctys. Consortium, 605 F.3d 740, 752 (9th Cir. 2010) (quoting Eng v. Cooley, 552 F.3d 1062, 1072 (9th Cir. 2009)). "In other words, [they] may avoid liability by showing that the employee's protected speech was not a but-for cause of the adverse employment action." Id. (alteration in Anthonie) (internal citations omitted). Furthermore, as explained in Griffin, "[a]n employer may negate causation ex post facto by presenting evidence of other reasons for termination outside of the protected conduct, even if the other reasons were unknown to the employer at the time of termination." 654 F. Supp. 2d at 1132 (internal citation omitted).

Here, Defendant meets its burden by presenting uncontested evidence that it would have terminated Plaintiff regardless of her protected activity. Plaintiff does not disputed that she consistently received negative performance reviews, complaints, and corrective action plans, starting in 2011, resulting in her placement on probationary status in 2015. [CSOF at ¶¶ 14, 19, 30-34, 39-40.] Plaintiff also failed her probationary period, for which she was notified would result in her termination. [CSOF at ¶ 34.] These documented instances of poor performance provide ample, nondiscriminatory reasons for Plaintiff's termination. Defendant has met the burden described in Griffin by demonstrating that the termination was because of legitimate reasons, and thus negating that it was caused by her protected conduct.

Defendant has also shown that Plaintiff's protected conduct was not the but-for cause of her termination. Because her protected activity was not the but-for cause of her termination, Plaintiff's HWPA claim is fatally flawed. Therefore, the Motion is granted as to this portion of Count III.

As the operative facts have been admitted by both sides in the CSOF and Responsive CSOF, there are no triable questions of fact to prevent the entry of summary judgment.[6]

CONCLUSION

On the basis of the foregoing, Defendant's Motion for Summary Judgment, filed June 26, 2019, is HEREBY GRANTED IN PART AND DENIED IN PART. The Motion is DENIED AS MOOT as to the portion of Count I alleging age discrimination, because that claim has been dismissed, and the Motion is GRANTED insofar as summary judgment is granted in favor of Defendant as to all of Plaintiff's other claims. There being no remaining claims in this case, the Clerk's Office is DIRECTED to enter judgment and close this case immediately.

IT IS SO ORDERED.

[6] Plaintiff alluded to a potential HWPA claim based on a complaint she made to the DOL in October 2013, regarding Defendant's failure to deposit 401(k) contributions into her account. [Bach Decl. at ¶ 4.] This claim does not appear in the Complaint. While the complaint to the DOL is included as an alleged fact in Plaintiff's opposition memorandum, it does not appear in her discussion of Plaintiffs HWPA Claim. Defendant raised and addressed the issue of Plaintiff's DOL complaint, arguing it was time barred. [Mem. in Supp. of Motion at 29-30.] Plaintiff did not address the DOL complaint in her response. [Mem. in Opp. at 16-17.] Therefore, the Court does not construe Count III as alleging a HWPA claim based on her complaint to the DOL.

DATED AT HONOLULU, HAWAI`I, November 15, 2019.

/s/ Leslie E. Kobayashi
Leslie E. Kobayashi
United States District Judge

SONIA B. BACH VS. COMMUNITY TIES OF AMERICA, INC.; CV 18-00103 LEK-WRP; ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT